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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2009
No.

Supreme Court, U.S.
FILED
09-299 SEP 1 - 2009
OFFICE OF THE CLERK

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner,
vs.

HARROLD EMMETT SHAFIER, III
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE QUESTION

I.

The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. *Doyle v Ohio* prohibits uninvited prosecution reference to an accused's silence after Miranda warnings. Should *Doyle* be revisited and overruled?

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PETITION FOR WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

NOW COMES the State of Michigan, by FREDERICK ANDERSON, *Prosecuting Attorney for the County of Allegan* and TIMOTHY A. BAUGHMAN, *Special Assistant Prosecuting Attorney*, and prays that a Writ of Certiorari issue to review the judgment of the Michigan Supreme Court, entered in this cause on July 1 ,2009.

OPINIONS BELOW

The 1 opinion of the Michigan Court of Appeals is published at 277 Mich.App 137, 743 N.W.2d 742 (2007), and appears as Appendix A. The opinion of the Michigan Supreme Court is published at 483 Mich 205, __N.W.2d__ (2009), and appears as Appendix B.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 USC §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person...shall be compelled in any criminal case to be a witness against himself.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ....No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of Facts

The facts are taken from the opinion of the Michigan Supreme Court.

Respondent was charged with three counts of first degree criminal sexual conduct and two counts of second-degree criminal sexual conduct for allegedly sexually assaulting his 13-year-old daughter.

In the prosecutor's opening statement, he said that the jury would hear that after defendant was arrested, he "didn't say anything, not a word. [The officer] told him why he was being arrested, he was arrested and no statements were made." Next, in the presentation of the case-in-chief, the following exchange occurred regarding the circumstances of the arrest:

> *A.* [*The Arresting Officer*] I asked [defendant] if he knew what we were here about—what we were there about and he stated he did not. I then placed him under arrest and informed him he was under arrest for criminal sexual conduct, advised him of his *Miranda* rights which is the right to remain silent and I'm sure we've all seen that, and I placed him in the rear of my patrol vehicle. He did not make any statements to me prior to getting to jail.
>
> *Q.* [*The Prosecutor*] So he never made any statements to you. He was fully aware of what you were arresting him for?

A. Not reference [sic] the criminal sexual conduct, correct.

On cross-examination, the defense attorney asked the arresting officer questions
that clarified that the officer did not ask defendant any questions after arresting him and giving him his *Miranda* warnings. On the prosecutor's redirectexamination, the prosecutor followed up with additional questions regarding
defendant's silence:

Q. [*The Prosecutor*] [Defendant] didn't make any statements about the CSC charge, did he?

A. [*The Arresting Officer*] No, he did not.

Q. Never asked you about it?

A. No, he did not.

After the prosecutor concluded presentation of his case, defendant testified in his own defense. Defense counsel asked why defendant was silent after he was given his *Miranda* warnings, and defendant stated that it was because he "watched a lot of TV and with something like that I didn't know what to say, I mean I was shocked . . . so I just kept my mouth shut and I was going to wait until I talked to somebody." When the prosecutor cross-examined defendant, the following exchange occurred:

arrested for criminal sexual conduct. Is that right?

A. [*Defendant*] When I got to the police station—

Q. Yes or no. Is that right?

A. Yes.

The prosecutor began his closing argument by stating:

> What we heard is that the defendant made no statements. We heard that he didn't ask Officer LaBonte any questions. Why?
>
> You're being arrested for CSC. You're being taken out of your home on a Sunday night. Why? Why? Because between June of 2004 and January of 2005 the defendant had been making his daughter do things that no person speaks about. Adults don't even talk about it between themselves.

The Michigan Court of Appeals found that *Doyle v Ohio*, see infra, had been violated, but applied the plain-error standard of review because there had been no objection to any of the questions or argument, and did not find that standard met (see appendix A). The Michigan Supreme Court agreed that *Doyle* error had occurred, but found plain error requiring reversal (see appendix B).

Reasons for Granting the Writ

I.

The Fifth Amendment provides that no person shall be compelled in any criminal case to be a witness against himself. *Doyle v Ohio* prohibits uninvited prosecution reference to an accused's silence after Miranda warnings. *Doyle* should be revisited and overruled.

A. Introduction: The Underpinnings of *Doyle*

"Our forefathers, when they wrote this provision into the Fifth Amendment, had in mind a lot of history which has been largely forgotten today."[1]

The protection of the Fifth Amendment is against *compelled* self-incrimination in criminal cases, and a discussion of the permissibility of comments on silence, whether before arrest, after arrest, before Miranda warnings, after Miranda warnings, or during trial, seems odd when one takes account of history. At the time of the Founding, and also of the ratification of the Bill of Rights, no state even *permitted*, much less compelled, an accused in a criminal case to testify. It was not until 1864 that Maine became the first state to permit defendants to testify, and Congress did not follow suit until 1878.[2] But criminal

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[1] *Maffie v United States*, 209 F2d 225, 237 (1954)(Judge Calvert Magruder).

[2] See Ralph Rossum, "'Self-Incrimination': The Original Intent," in Hickok, ed., *The Bill of Rights: Original Meaning and Current Understanding*

defendants were not actually silent at their trials, they simply were not competent as sworn witnesses. Instead, the defendant was permitted—and often expected—to give an unsworn statement at trial on his own behalf, and was also expected to give a statement *pretrial.* The failure to make a statement to the justice of the peace *would be reported to the jury.*[3] As Sir James Stephen noted, evidence given against the defendant operated as "so much indirect questioning," and if the defendant "omitted to answer the questions it suggested he was very likely to be convicted."[4] If a defendant was not permitted to be a witness at trial, but was expected to make unsworn statements, the failure to do so to be held against him, why, then, the inclusion of the Fifth Amendment protection against compelled self-incrimination in criminal cases?

Some scholars, Leonard Levy principal among them, take the view that the Founders, and the members of state constitutional conventions which enacted similar protections on which the Fifth Amendment was based, "failed to say what they meant," for if they meant what they said, then the common-law prohibition on testimony from the accused in criminal cases rendered the Fifth

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(University of Virginia Press: 1991), p.276.

[3] Langbein, "The Privilege and Common Law Criminal Procedure," in *The Privilege Against Self-Incrimination*, quoted by Justice Scalia, dissenting, in *Mitchell v United States*, 526 US 314, 119 S Ct 1307, 143 L Ed 2d 424 (1999).

[4] J. Stephen, 1 *History of the Criminal Law of England* 440 (1883).

Amendment superfluous.[5] Instead, concluded Levy, what those individuals drafting state Bill of Rights and the Fifth Amendment actually *meant* to do was adopt the common-law right of *nemo tenetur seipsum acusare* (no one is bound to accuse himself), which protected not only against courts in criminal cases, but against all of government, in all kinds of actions, protecting witnesses as well as the accused, and protecting against "threats of criminal liability, civil exposure, and public obloquy."[6] This redrafting of the Fifth Amendment is not tenable.

Professor Rossum nicely notes that Levy and his followers fail to take account of the very real probability—given the express language of the Fifth Amendment—that the drafters were not writing to "end some current abuse but simply to provide a floor of constitutional protection above which the common law was free to operate but below which it could not go."[7] Though it seems quaint now, during the 17th century the very giving of an *oath* was held itself to be a coercive act, and the ecclesiastical Court of High Commission engaged in the practice of summoning those with nonconformist opinions and requiring them to take an oath and answer questions. Refusing the oath resulted in contempt and Star Chamber proceedings; lying under oath was perjury; telling the truth under oath could subject one to prosecution for political and religious crimes. The celebrated trial of John Lilburne, a Puritan agitator

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[5] See Levy, *The Origins of the Fifth Amendment (2d Ed)* (MacMillan: 1986).

[6] See Rossum, at 276.

[7] Rossum, at 277.

who refused to take the oath, led to the prohibition of the administration of any oath obliging a person "to confess or accuse himself or herself of any crime."[8] Professor Albert Alschuler concludes that the history of the Fifth Amendment is "almost entirely a story of when and for what purposes people would be required to speak under oath."[9]

Requiring an oath of the criminally accused was coercive, and banned for that reason, as being equivalent to torture and the rack. Manuals which instructed justices of the peace on the conduct of their office warned, from the late 16th century through the mid- 19th century, that "The law of England is a Law of Mercy, and does not use the Rack or Torture to compel criminals to accuse themselves....I take it to be for the Same Reason, that it does not call upon the Criminal to answer upon Oath. For, this might serve instead of the Rack, to the Consciences of Some Men, although they have been guilty of offenses...."[10] To put the matter finely, then, the purpose of the Fifth Amendment, when understood in its historical context, was "to outlaw torture and improper methods of interrogation," *including the compelling of testimony under oath.*[11] Put another way, the purpose of the Fifth Amendment was to preclude

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[8] See Wigmore, "The Privilege Against Self-Incrimination: Its History," 15 Harv L Rev 610, 621-24 (1902).

[9] Alschuler, "A Peculiar Privilege in Historical Perspective: The Right to Remain Silent," 94 Mich L Rev 2625, 2638 (1994).

[10] See Alschuler, at 2648.

[11] Alschuler, at 2631.

the obtaining of statements or testimony from the accused in criminal cases by use of coercive governmental conduct.[12]

Doyle v Ohio[13] is built on *Griffin v California*,[14] which bars comment on the defendant's decision not to testify on the basis that such comments violate the Fifth Amendment. This notion is, as indicated above, contrary to the text and history of the Amendment. To reiterate, pretrial procedure in colonial America was governed by the Marian Committal Statute, which provided:

> [S]uch Justices or Justice [of the peace] before whom any person shall be brought for Manslaughter or Felony, or for suspicion thereof, before he or they shall commit or send such Prisoner to Ward, shall take the examination of such Prisoner, and information of those that bring him, of the fact and circumstance thereof, and the same or as much thereof as shall be material to prove the Felony shall put in writing, within two days after the said examination....

The justice of the peace testified at trial as to the content of the defendant's statement; if the defendant refused to speak, *this would also have*

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[12] And see the discussion by Justice Scalia dissenting in *Mitchell v. United States*, supra).

[13] *Doyle v Ohio*, 426 US 610, 96 S Ct 2240, 49 L Ed 2d 91 (1976).

[14] *Griffin v California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

been reported to the jury.[15] And Justices of the peace continued pretrial questioning of suspects, whose silence continued to be introduced against them at trial, after the ratification of the Fifth Amendment.[16]

Doyle's decision to ban reference to an accused's silence after receiving Miranda warnings was not without its dissenters. Justice Stevens objected that "there is nothing deceptive or prejudicial to the defendant in the Miranda warning. Nor do I believe that the fact that such advice was given to the defendant lessens the probative value of his silence, or makes the prosecutor's cross-examination about his silence any more unfair than if he had received no such warning."[17] And the majority in *Portuondo v Agard*, permitting comment on defendant's presence in the courtroom throughout all the testimony, observed that

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[15] Langbein, The Privilege and Common Law Criminal Procedure, in The Privilege Against Self-Incrimination 82, 92 (Helmholz et al. eds.1997).

[16] See See, *e.g.*, Fourth Report of the Commissioners on Practice and Pleadings in New York-Code of Criminal Procedure xxviii (1849); 1 Complete Works of Edward Livingston on Criminal Jurisprudence 356 (1873), referenced by Justice Scalia in *Mitchell*. See also Justice Scalia's further discussion of the illogic of the *Griffin* decision, concluding that *Griffin* was a "wrong turn" in constitutional jurisprudence, and Justice Thomas"s call for a "reexamination" of *Griffin* in his opinion in *Mitchell*.

[17] *Doyle*, at 426 U.S. 610, 621, 96 S.Ct. 2240, 2246 (Stevens, J., dissenting).

"Although there might be *reason to reconsider Doyle,* we need not do so here."[18]

There is now reason to do so in this case, for that which occurred should not be considered to be a violation of the Constitution. *Griffin* and its progeny, including *Doyle*, stray so far from text and history that revisiting them, and overruling at least *Doyle,* is appropriate.[19]

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[18] *Portuondo v. Agard,* 529 U.S. 61, 74, 120 S.Ct. 1119, 1128 (2000) (emphasis added).

[19] This undertaking should not be blocked by principles of *stare decisis.* See *Arizona v Gant*, 556 US__, 129 S Ct 1710, 173 L Ed 2d 485 (2009); *Montejo v Louisiana*, __US__, 129 S Ct 2079 (2009).

Conclusion

Wherefore, the Petitioner requests that certiorari be granted.

Respectfully submitted,

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Appendix A: Court of Appeals Opinion
Court of Appeals of Michigan.

Court of Appeals of Michigan.

PEOPLE of the State of Michigan, Plaintiff-Appellee,
v.
HAROLD EMMETT SHAFIER, III, Defendant-Appellee.

Docket No. 267192.

October 30, 2007
Released for Publication January 17, 2008

Before: SCHUETTE, P.J., and O'CONNELL and DAVIS, JJ.

SCHUETTE, P.J.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b) (victim between 13 and 16 years of age and actor related to victim by affinity). Defendant was sentenced to 71 to 180 months' imprisonment. Defendant now appeals as of right. Although the prosecutor erroneously commented at trial about defendant's post-*Miranda*[FN1] silence, we conclude that defendant has failed to show that his substantial rights were affected by the error. Therefore, we affirm.

FN1. *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

I. FACTS

Defendant and his wife adopted the victim and her three biological sisters in 1995, when the victim was approximately four years old. In this tragic case, the victim testified that defendant sexually assaulted her on a daily basis from July 3, 2004, through January 2, 2005. She claimed that defendant initiated the abuse by touching her on the exterior of her clothing and kissing her. However, the abuse progressed to direct touching by defendant of the victim's breasts, buttocks, and vagina, and the victim indicated that defendant eventually performed oral sex on her and that she performed the same on him. At the time of the sexual assault, the victim was 13 years old.

When asked to recall the details of any specific instance of abuse, the victim had a hard time doing so. However, she did recall that one of her sisters walked into the room on one occasion when defendant was performing oral sex on her, and she relayed a variety of specific details of this alleged incident. But at the time of her January 3, 2004, forensic interview, the victim claimed that defendant touched her on two occasions and she did not report that the abuse included oral sex.

One of the victim's sisters testified that she walked in on defendant and the victim when they were standing close to each other, as if they had been kissing. She also testified that defendant sexually abused her during a two-year period, when she was 11 to 13 years of age. Another of the victim's sisters testified that she observed defendant performing oral sex on the victim. Defendant took the stand in his defense and denied touching the victim or any of his other daughters inappropriately.

The jury announced that they were deadlocked after just two hours of deliberation. The

trial court instructed them to continue to deliberate. On the second day of deliberations, the jury acquitted defendant of three counts of first-degree criminal sexual conduct, MCL 750.520b, but convicted him of two counts of second-degree criminal sexual conduct. Defendant now appeals.

II. PROSECUTORIAL MISCONDUCT

Defendant's sole claim on appeal is that the prosecutor's repeated reference to his silence at the time of his arrest was error requiring reversal. We disagree.

A. Standard of Review

We review defendant's unpreserved claim of constitutional error for plain error **744 affecting his substantial rights. *People v. Carines,* 460 Mich. 750, 763, 597 N.W.2d 130 (1999).

B. Analysis

Caselaw is clear that, under certain circumstances, prosecutorial comment on a criminal defendant's exercise of the constitutional right to remain silent in the *140 face of accusation violates his Fourteenth Amendment [FN2] right to due process. *Doyle v. Ohio,* 426 U.S. 610, 618-619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *People v. Dennis,* 464 Mich. 567, 573-574, 628 N.W.2d 502 (2001); *People v. Sain,* 407 Mich. 412, 415-416, 285 N.W.2d 772 (1979); *People v. Bobo,* 390 Mich. 355, 359, 212 N.W.2d 190 (1973). With very limited exceptions,[FN3] a defendant's silence after he or she has been informed of his or her right to remain silent under *Miranda v. Arizona,* 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), may not be used as evidence against him or her because " *Miranda* warnings carry an implicit assurance that silence

in reliance on those warnings will not be penalized." *Dennis, supra* at 574, 628 N.W.2d 502. Here, the record is unambiguous with regard to the timing of defendant's silence because the arresting officer testified that he immediately informed defendant of his *Miranda* rights at the time of his arrest. Therefore, the prosecutor's use of the evidence of defendant's post-*Miranda* silence for impeachment purposes and as substantive evidence of his guilt in the prosecutor's case-in-chief presents a constitutional question. *People v. Alexander,* 188 Mich.App. 96, 104-105, 469 N.W.2d 10 (1991). While a single, inadvertent reference to post-*Miranda* silence may not amount to constitutional error, deliberate "use" of this evidence against a defendant does. *Dennis, supra* at 579-580, 628 N.W.2d 502.

FN2. U.S. Const., Am. XIV.

FN3. Such exceptions include, for example, where a defendant made a valid *Miranda* waiver, *People v. McReavy,* 436 Mich. 197, 218-220, 462 N.W.2d 1 (1990), or to contradict a defendant's assertion that he made an exculpatory statement to the police at the time of his arrest. *People v. Sutton (After Remand),* 436 Mich. 575, 579, 464 N.W.2d 276 (1990).

In this case, the prosecutor's references to defendant's silence were not inadvertent and they were numerous. The prosecutor specifically inquired about defendant's silence during his case-in-chief. The prosecutor*141 followed up on the statement of the arresting officer that defendant made no comment at the time of his arrest by asking the following question: "So he never made

any statement to you. He was fully aware of what you were arresting him for?" On cross-examination, the arresting officer acknowledged that he followed the instruction of the detective in charge of defendant's case not to question defendant. On redirect examination, the arresting officer and the prosecutor engaged in the following exchange:

Q. [Y]ou didn't interview the defendant, but he didn't make any statements about the CSC charge, did he?

A. No, he did not.

Q. Never asked you about it?

A. No, he did not.

On cross-examination of defendant, the prosecutor asked him why he did not speak to the arresting officer about the criminal sexual conduct allegations:

Q. But yet you didn't say a single word about being arrested for criminal sexual conduct. Is that right?

A. When I got to the police station·

Q. Yes or no. Is that right?

A. Yes.

The prosecutor asked a pair of questions regarding whether defendant went to the police or to child protective services officials to declare his innocence following his arrest. The trial court sustained defense counsel's objection to the first of these questions without asking him to state a basis

for the objection. When defense counsel objected to the second question, he stated that the question violated the attorney-client privilege. Following a bench conference, which was not recorded, the prosecutor moved on to a different line of questioning.

Additionally, during closing arguments, the prosecutor harkened back to the testimony. Significantly, defense counsel did not object to the prosecutor's closing argument. The prosecutor stated that "this case is about many lies" and argued that defendant's lies began at the time of his arrest.

> What we heard is that the defendant made no statements. We heard that he didn't ask Officer LaBonte any questions. Why? You're being arrested for CSC. You're being taken out of your home on a Sunday night. Why? Why? Because defendant had his daughter do things that no person speaks about.

The prosecution asserts on appeal that defendant's silence after his arrest was not attributable to the invocation of his right to remain silent and, therefore, there was no error in using it against him. *People v. McReavy,* 436 Mich. 197, 218-220, 462 N.W.2d 1 (1990). However, there is no evidence that defendant made a valid *Miranda* waiver, which would permit evidence of his silence to be used as substantive evidence of his guilt. *Id.* at 221-222, 462 N.W.2d 1. The arresting officer testified that defendant maintained his silence regarding the allegations of criminal sexual conduct after he had been provided with *Miranda* warnings and that he was not asked any questions

about those allegations. Therefore, unlike *McReavy,* this is not a case of selective silence in response to questioning. *Id.* at 212, 462 N.W.2d 1. See also *People v. Cetlinski (After Remand),* 435 Mich. 742, 749, 460 N.W.2d 534 (1990) (holding that "when an individual has not opted to remain silent, but has made affirmative responses to questions about the same subject matter testified to at trial, omissions from the statements do not constitute silence"). Here, the prosecutor asked the jury to infer that defendant was guilty because he did not take the affirmative step of questioning the arresting*143 officer about the charges against him or declaring his innocence to law-enforcement officials. Consequently, we find that the prosecutor's comments on defendant's post-*Miranda* silence amounted to constitutional error.

Nonetheless, because defendant's objection is unpreserved, reversal is required only if he establishes plain error that affected his substantial rights. *Carines, supra* at 763-764, 597 N.W.2d 130. Indeed, in *Carines,* our Supreme Court instructed:

> To avoid forfeiture under the plain error rule, three requirements must be met: (1) error must have occurred, (2) the error was plain, i.e., clear or obvious, (3) and the plain error affected substantial rights.... The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. [*Id.* at 763, 597 N.W.2d 130.]
>
> Further, the defendant bears the burden of persuasion with respect to prejudice. *Id.* Reversal is warranted only when the unpreserved error

> resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

Viewing the prosecutor's improper comments in light of the defense arguments and the other evidence admitted, we hold that defendant has not established plain error affecting his substantial rights. *Carines, supra* at 763, 597 N.W.2d 130. While we acknowledge that the prosecutor's use of defendant's post-*Miranda* silence here was arguably more extensive and deliberate than comparable cases in which Michigan appellate courts have declined to find that similar breaches of *Miranda* affected the outcome of the proceedings below, see, e.g., *People v. McNally,* 470 Mich. 1, 7-8, 679 N.W.2d 301 (2004); *Dennis, supra* at 578-579, 628 N.W.2d 502; *Sain, supra* at 415-416, 285 N.W.2d 772; *People v. Truong (After Remand),* 218 Mich.App. 325, 336-337, 553 N.W.2d 692 (1996), in light of the other evidence of defendant's guilt of second-degree criminal sexual conduct, we conclude that defendant has not demonstrated that the prosecutor's erroneous questions and comments regarding his post-*Miranda* silence affected the outcome of the lower court proceedings.

We affirm.

O'CONNELL, J., concurred.

DAVIS, J. (*dissenting*).

I respectfully dissent.

I fully agree with the majority's recitation of the facts in this case and of the applicable law. However, the majority reaches an anomalous conclusion on the basis of those facts and law. The majority's conclusion is wrong.

The majority's decision apparently rests on the feeble fulcrum of defense counsel's having only objected twice to the prosecutor's constitutionally impermissible references, made on three separate occasions.

The trial court sustained defense counsel's initial objection but apparently did not give a curative instruction. The second objection was dealt with at the bench, and there is no record of what was said by and between counsel and the court. The third, and probably most egregious, breach occurred in the prosecutor's closing argument. It was not objected to by defense counsel, but neither was it addressed by the trial court.

The constitutional rights we are charged with preserving under the Fourteenth Amendment are not those of the trial judge or defense counsel. They are rights afforded to *all* defendants under our system of criminal justice, no matter how odious the alleged *145 crime. The majority correctly observes that this is a tragic case. But it is impermissible to abrogate constitutional rights for that reason. Those rights were impermissibly breached in this case, and as the majority notes, those breaches were neither minor nor accidental. There is no way to know what effect those breaches had on the jurors' minds, particularly considering the jurors' initial announcement that they were deadlocked. In the parlance of the trial bar, this amounted to a bell that could not be unrung.

I believe that defendant has made the requisite showing of constitutional error requiring a new trial.

Appendix B: Opinion of the Michigan Supreme Court

July 1, 2009

SC: 135435

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

HAROLD EMMETT SHAFIER, III,
Defendant-Appellant.
_____/

BEFORE THE ENTIRE BENCH

CAVANAGH, J.

We granted leave to appeal in this case to determine whether the prosecution's references to defendant's post-arrest, post- MirandaFN1 silence violated defendant's constitutional due process rights, and, if so, whether defendant is entitled to a new trial.FN2 We hold that defendant's due process rights were violated. Further, the violation amounted to plain error that affected defendant's substantial rights and seriously affected the fairness and integrity of the trial. We reverse defendant's conviction and remand to the trial court for further proceedings.

FN1. Miranda v. Arizona, 384 U.S. 436; 86 S Ct 1602; 16 L.Ed.2d 694 (1966).

FN2. The issues in this case are similar to those presented in another case we decide today: People v. Borgne, ··· Mich. ····; ··· NW2d ···· (Docket No. 134967, issued July 1, 2009). Accordingly, much of the analysis in this opinion is very similar, and at times the same, as that in Borgne. However, the cases were argued separately and they are distinct enough that we have not combined them in one opinion.

I. BASIC FACTS AND PROCEEDINGS

Defendant, Harold E. Shafier III, was charged with three counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct for allegedly sexually assaulting his 13-year-old daughter, AS. Defendant and his wife adopted AS and her three sisters in 1995. In January 2005, defendant's wife reported to the police that AS was alleging that she had been sexually assaulted by defendant. Defendant was arrested immediately. During the arrest, defendant asked why he was being arrested, and the officer told him that he was under arrest for criminal sexual conduct. The officer gave him the Miranda warnings, and defendant remained silent thereafter.

At trial, AS testified that defendant sexually assaulted her on a daily basis from July 2004 until he was arrested. She testified that the abuse escalated over time from kissing and touching to digital penetration and oral sex. FN3 She listed a few settings where the abuse occurred but initially had some difficulty describing specific incidents. AS described one instance in which one of her sisters walked in while defendant was performing oral sex on AS. The sister, age 11, testified and corroborated this story, although there were discrepancies

between their accounts.FN4 Another sister, age 17, testified that she once walked into the family's barn and found AS and defendant standing close to each other and that it appeared to her that they were about to kiss or had just been kissing.FN5 AS and her sisters testified that defendant would sometimes take one or more of the girls to the store with him upon their request and buy everyone candy, but that he probably bought AS the most candy. Defendant's wife testified that she thought defendant had been favoring AS by taking her shopping and visiting her school.

FN3. AS's allegations escalated over time. Initially, AS told her mother that defendant had touched her breasts and genital area. At the preliminary examination, AS alleged that there had been incidents involving oral sex. Finally, at trial, AS alleged specific incidents that she had not previously mentioned.

FN4. The discrepancies were in regard to when the incident occurred, the exact physical positions of AS and defendant, and the actions of each of the three people after the sister's interruption.

FN5. This sister also testified that defendant had sexually assaulted her when she was younger. At the preliminary examination, she stated that defendant had touched her breasts twice, but one of the times was accidental. At trial, she alleged for the first time that defendant had regularly touched her, kissed her, and digitally penetrated her when she was between the ages of 11 and 13.

Defendant testified in his own defense and adamantly maintained that he had never sexually assaulted any of his daughters. He denied the

factual circumstances of the specific allegations that AS and her sisters made. He stated that it would have been physically impossible for the alleged incident of oral sex to have occurred in the manner described by AS and her sister because the table on which it was supposed to have occurred was covered with boxes at the time. Defendant also denied favoring AS. He stated that he had begun stopping at AS's school to check her progress because she was the only child not doing well in school. He testified that, after school, he often took one or more of the children shopping with him and would buy candy for any of the children who requested it.

Defendant testified that he suspected that his wife encouraged their daughters to make false allegations against him because she was jealous of the time he was spending with their daughters. It is undisputed that up to and during the period of the alleged incidents, the relationship between defendant and his wife had deteriorated. Defendant testified that he had become increasingly angry with his wife's treatment of the children and consciously decided to become more involved in the children's lives in July 2004. Defendant stated that his wife had reacted with jealousy and anger as he increased the time he spent with the girls.

At trial, the prosecutor referred to defendant's post-Miranda silence multiple times, including in his opening and closing statements, direct and redirect examinations of the arresting officer, and cross-examination of defendant. Defense counsel objected during the prosecutor's cross-examination of defendant, but the basis for the objection was unclear.

After two hours of deliberation, the jury announced that it was deadlocked. The court instructed the jury to continue to deliberate. On the second day, after rehearing portions of the trial testimony, the jury acquitted defendant of three counts of first-degree criminal sexual conduct and convicted him of two counts of second-degree criminal sexual conduct.

Defendant appealed, and a divided Court of Appeals panel affirmed his convictions. People v. Shafier, 277 Mich.App 137; 743 NW2d 742 (2007). The majority held that the prosecutor's use of defendant's post- Miranda silence in his case-in-chief violated defendant's constitutional rights, reasoning that the prosecutor's references "were not inadvertent and they were numerous" and that "the prosecutor asked the jury to infer that defendant was guilty because he did not take the affirmative step of questioning the arresting officer ... or declaring his innocence...." Shafier, 277 Mich.App at 140, 142-143. The majority held that defendant was not entitled to a new trial, however, because defendant did not establish that the violation was plain error affecting his substantial rights. Id. at 143-144. The Court of Appeals dissent would have granted defendant a new trial because "[t]here is no way to know what effect those breaches had on the jurors' minds, particularly considering the jurors' initial announcement that they were deadlocked." Id. at 145 (Davis, J., dissenting). This Court granted defendant's application for leave to appeal.

II. STANDARD OF REVIEW

Defendant raises an unpreserved claim of constitutional error. Constitutional questions are reviewed de novo. Sidun v. Wayne Co Treasurer,

481 Mich. 503, 508; 751 NW2d 453 (2008). This Court reviews the effect of an unpreserved constitutional error under the plain-error standard. People v. McNally, 470 Mich. 1, 5; 679 NW2d 301 (2004).

III. ANALYSIS

A. VIOLATION OF DEFENDANT'S DUE PROCESS RIGHTS

Defendant argues that his constitutional due process rights were violated under Doyle v. Ohio, 426 U.S. 610; 96 S Ct 2240; 49 L.Ed.2d 91 (1976), and its progeny. We hold that the prosecution's repeated references to defendant's post-arrest, post- Miranda silence violated defendant's due process rights under the United States Constitution.FN6

FN6. This Court has recognized that the Michigan Constitution's protection against the use of a defendant's post-arrest, post- Miranda silence is at least as extensive as that provided by the United States Constitution. See People v. McReavy, 436 Mich. 197, 201; 462 NW2d 1 (1990). Because defendant's due process rights were so clearly violated under the United States Constitution in this case, however, it is not necessary to evaluate the protection provided by the state constitution.

1. Rule of Doyle v. Ohio and its Progeny

The United States Constitution guarantees that no person "shall be compelled in any criminal case to be a witness against himself." US Const, Am V. FN7 Miranda v. Arizona, 384 U.S. 436, 444-439, 467-468; 86 S Ct 1602; 16 L.Ed.2d 694

(1966), established "guidelines for law enforcement agencies and courts to follow" in order to protect the privilege against compelled self-incrimination during custodial police interrogations. Thus, under Miranda, every person subject to interrogation while in police custody must be warned, among other things, that the person may choose to remain silent in response to police questioning. Id. at 444-445. As a general rule, if a person remains silent after being arrested and given Miranda warnings, that silence may not be used as evidence against that person. Wainwright v. Greenfield, 474 U.S. 284, 290-291; 106 S Ct 634; 88 L.Ed.2d 623 (1986). Therefore, in general, prosecutorial references to a defendant's post-arrest, post-Miranda silence violate a defendant's due process rights under the Fourteenth Amendment of the United States Constitution.FN8 See Wainwright, 474 U.S. at 290-291; Doyle, 426 U.S. at 618-620.

FN7. The Fifth Amendment has been made applicable to the states through the Due Process Clause of the Fourteenth Amendment. See Malloy v. Hogan, 378 U.S. 1, 3; 84 S Ct 1489; 12 L.Ed.2d 653 (1964).

FN8. The United States Constitution does not prohibit impeaching a defendant with pre-arrest silence. See Fletcher v. Weir, 455 U.S. 603, 605-607; 102 S Ct 1309; 71 L.Ed.2d 490 (1982); Jenkins v. Anderson, 447 U.S. 231, 239-240; 100 S Ct 2124; 65 L.Ed.2d 86 (1980). Federal courts of appeals are split on whether it violates a defendant's Fifth Amendment rights under the United States Constitution for pre- Miranda silence to be used in the prosecution's case-in-chief. See generally Combs v. Coyle, 205 F3d 269, 285 (CA 6, 2000) (summarizing the position of each circuit for

pre-arrest, pre- Miranda silence). See also United States v. Frazier, 408 F3d 1102, 1111 (CA 8, 2005) (holding that post-arrest, pre- Miranda silence may be used in the prosecution's case-in-chief in some circumstances); United States v. Moore, 322 U.S. App DC 334, 344; 104 F3d 377 (1997) (holding that post-arrest, pre- Miranda silence may not be used in the prosecution's case-in-chief). This Court has not addressed this issue. See McNally, 470 Mich. at 7 n 4. These issues are not before this Court today, and this opinion has no effect on their resolution.

The United States Supreme Court has explained the rationales behind the constitutional prohibition against the use of a defendant's post-arrest, post- Miranda silence. To begin with, a defendant's silence may merely be the defendant's invocation of the right to remain silent, as opposed to a tacit acknowledgement of guilt. "[E]very post-arrest silence is insolubly ambiguous...." Doyle, 426 U.S. at 617. Further, Miranda warnings provide an implicit promise that a defendant will not be punished for remaining silent. Id. at 618. Once the government has assured a person of his right to remain silent, "breaching the implied assurance of the Miranda warnings is an affront to the fundamental fairness that the Due Process Clause requires." Wainwright, 474 U.S. at 291.

Consistent with these rationales, a defendant's post-arrest, post- Miranda silence cannot be used to impeach a defendant's exculpatory testimony, see Doyle, or as direct evidence of defendant's guilt in the prosecutor's case-in-chief, see Wainwright, 474 U.S. at 292-294.FN9 "What is impermissible is the evidentiary use of an individual's exercise of his constitutional rights after the State's assurance

that the invocation of those rights will not be penalized." Id. at 295. There are limited exceptions to this general rule, but none applies here.FN10 This Court has adopted this understanding of a defendant's due process rights and stated that post-arrest, post- Miranda silence "may not be used substantively or for impeachment purposes since there is no way to know after the fact whether it was due to the exercise of constitutional rights or to guilty knowledge." People v. McReavy, 436 Mich. 197, 218; 462 NW2d 1 (1990).

FN9. In Doyle, the Court held that the prosecution could not use a defendant's post-arrest, post-Miranda silence to impeach the credibility of a defendant's exculpatory testimony. Doyle, 426 U.S. at 618. The prosecution attempted to use the defendants' silence to impeach the credibility of the defendants' claim, told for the first time at trial, that they had been framed. Id. at 611-614. The Court reasoned that "it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." Id. at 618.

In Wainwright, the Court held that the prosecution could not use a defendant's post-arrest, post- Miranda silence to meet the prosecutor's burden of showing beyond a reasonable doubt that the defendant was not insane. Wainwright, 474 U.S. at 286, 289-296. The Court explained that Doyle's reasoning applied with equal force because "[t]he implicit promise, the breach, and the consequent penalty are identical in both situations." Id. at 292.

FN10. For example, in Doyle, the Court noted that the prosecution may use evidence of a defendant's post-arrest, post- Miranda silence to challenge a defendant "who testifies to an exculpatory version of events and claims to have told the police the same version upon arrest." Doyle, 426 U.S. at 619 n 11. This exception is not applicable here because defendant never claimed that he told the police an exculpatory story after he was given his Miranda warnings.

In general, any reference to a defendant's post-arrest, post- Miranda silence is prohibited, but in some circumstances a single reference to a defendant's silence may not amount to a violation of Doyle if the reference is so minimal that "silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference...." Greer v. Miller, 483 U.S. 756, 764-765; 107 S Ct 3102; 97 L.Ed.2d 618 (1987). See also People v. Dennis, 464 Mich. 567, 577-580; 628 NW2d 502 (2001). For example, in Greer, there was no Doyle violation where the defense counsel immediately objected to a question by the prosecution about defendant's post-arrest, post-Miranda silence, and the trial court twice gave a curative instruction to the jury.FN11 Greer, 483 U.S. at 759, 764-765.

FN11. In Greer, the defendant testified that he was innocent, but two other people had confessed their guilt to him. Greer, 483 U.S. at 758. On cross-examination, the prosecutor asked the defendant, " 'Why didn't you tell this story to anybody when you got arrested?' " Id. at 759. Defense counsel immediately objected, and the trial court sustained the objection and twice instructed the jury to ignore the reference. Id.

2. Further Background

In this case, the prosecutor made repeated references to defendant's post-arrest, post- Miranda silence. In the prosecutor's opening statement, he said that the jury would hear that after defendant was arrested, he "didn't say anything, not a word. [The officer] told him why he was being arrested, he was arrested and no statements were made." Next, in the presentation of the case-in-chief, the prosecutor deliberately elicited testimony from the arresting officer regarding defendant's post-arrest, post- Miranda silence. The following exchange occurred regarding the circumstances of the arrest:

A. [The Arresting Officer] I asked [defendant] if he knew what we were here about-what we were there about and he stated he did not. I then placed him under arrest and informed him he was under arrest for criminal sexual conduct, advised him of his Miranda rights which is the right to remain silent and I'm sure we've all seen that, and I placed him in the rear of my patrol vehicle. He did not make any statements to me prior to getting to jail.

Q. [The Prosecutor] So he never made any statements to you. He was fully aware of what you were arresting him for?

A. Not reference [sic] the criminal sexual conduct, correct.

On cross-examination, the defense attorney asked the arresting officer questions that clarified that the officer did not ask defendant any questions after arresting him and giving him his Miranda warnings. On the prosecutor's redirect

examination, the prosecutor followed up with additional questions regarding defendant's silence:

Q. [The Prosecutor] [Defendant] didn't make any statements about the CSC charge, did he?

A. [The Arresting Officer] No, he did not.

Q. Never asked you about it?

A. No, he did not.

After the prosecutor concluded presentation of his case, defendant testified in his own defense. Defense counsel asked why defendant was silent after he was given his Miranda warnings, and defendant stated that it was because he "watched a lot of TV and with something like that I didn't know what to say, I mean I was shocked ... so I just kept my mouth shut and I was going to wait until I talked to somebody." FN12 When the prosecutor cross-examined defendant, the following exchange occurred:

FN12. The full exchange between defense counsel and defendant regarding defendant's silence was as follows:
Q. [The Defense Counsel]. Were you nervous [when being arrested]?
A. [Defendant]. Oh yes, scared shit-scared to death.
Q. Did you-what-you just got silent then?
A. Yeah, I didn't say anything, yeah.
Q. Okay. Why did you not say anything?
A. Just watched a lot of TV and with something like that I didn't know what to say, I mean I was shocked that he even said that [I was being

arrested for CSC] so I just kept my mouth shut and I was going to wait until I talked to somebody.
Q. Was he [the officer] cooperative with you in talking with you or was he pretty short with you?
A. He just told me what I had to-what he told, what he felt I had to know and that was it, yeah.
Q. Okay. So, he wasn't volunteering information.
A. No.
Q. [The Prosecutor] [Y]ou didn't say a single word about being arrested for criminal sexual conduct. Is that right?

A. [Defendant] When I got to the police station-

Q. Yes or no. Is that right?

A. Yes.

Finally, the prosecutor began his closing argument by highlighting the significance of defendant's silence. The prosecutor stated:

> What we heard is that the defendant made no statements. We heard that he didn't ask Officer LaBonte any questions. Why? You're being arrested for CSC. You're being taken out of your home on a Sunday night. Why? Why? Because between June of 2004 and January of 2005 the defendant had been making his daughter do things that no person speaks about. Adults don't even talk about it between themselves.

3. Application of Doyle v. Ohio and its Progeny

It is clear that the prosecution's use of defendant's silence violated defendant's due process rights under the federal constitution.

The prosecutor's examination of the arresting officer established that the silence, to which the prosecutor referred occurred post-arrest and post- Miranda. A reference to a defendant's post-arrest, post- Miranda silence generally constitutes a Doyle violation unless the reference was so minimal that "silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference...." Greer, 483 U.S. at 764-765. In this case, the prosecution clearly crossed this line by repeatedly using defendant's post-arrest, post- Miranda silence as evidence of defendant's guilt in its case-in-chief and to impeach the defendant's testimony that he was innocent. The prosecutor impliedly asked the jury to infer guilt from defendant's silence through references to defendant's silence in his opening statement and his examination of the arresting officer. In his closing argument, the prosecutor expressly asked the jury to infer guilt from defendant's silence by explaining that the reason defendant had been silent was because "the defendant had been making his daughter do things that no person speaks about." Further, in his cross-examination of defendant, the prosecutor attempted to use defendant's silence to impeach defendant's credibility.

In sum, the state gave defendant his Miranda warnings, which constituted an implicit promise that his choice to remain silent would not be used against him. The state then breached that promise by attempting to use defendant's silence as evidence. Depending on the circumstances of the

case, even a single reference to a defendant's post-arrest, post- Miranda silence, either as evidence of substantive guilt or impeachment, may violate a defendant's due process rights. Where, as in this case, the prosecution makes repeated references to a defendant's silence, both as substantive evidence of guilt and for purposes of impeachment, the violation is clear. Therefore, we affirm the Court of Appeals holding that the prosecutor's repeated references to defendant's post-arrest, post- Miranda silence violated the due process rights guaranteed to defendant by the United States Constitution.

B. PLAIN-ERROR REVIEW

The Doyle violation in this case is an unpreserved, constitutional error.FN13 This Court determines whether this type of error warrants reversal under the plain-error standard of review articulated in People v. Grant, 445 Mich. 535, 547-553; 520 NW2d 123 (1994), and People v. Carines, 460 Mich. 750, 765-766; 597 NW2d 130 (1999).FN14

FN13. The Court of Appeals dissent suggests that defendant may have preserved this issue. Shafier, 277 Mich.App at 144-145 (Davis, J., dissenting). We will not address the issue of preservation, however, because the parties agreed that defendant failed to preserve an objection to any constitutional error in this case.

FN14. I continue to think that this Court erred by adopting the federal plainerror doctrine, for the reasons stated in Justice Levin's Grant dissent, and erred further by extending the doctrine to unpreserved, constitutional error, for the reasons

stated in then-Justice Kelly's Carines dissent. See Grant, 445 Mich. at 554-557 (Levin, J., dissenting); Carines, 460 Mich. at 775-783 (Kelly, J., dissenting). Nonetheless, as I have done in other cases, I recognize that Carines is the law in Michigan. See McNally, 470 Mich. at 5.

1. Plain-Error Review

There are four steps to determining whether an unpreserved claim of error warrants reversal under plain-error review. Carines, 460 Mich. at 763. First, there must have been an error. Id. "Deviation from a legal rule is 'error' unless the rule has been waived." Grant, 445 Mich. at 548 (quotation marks and citation omitted). Second, the error must be plain, meaning clear or obvious. Carines, 460 Mich. at 763. Third, the error must have affected substantial rights. Id. This "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." FN15 Id. The defendant bears the burden of establishing prejudice. Id. Fourth, if the first three requirements are met, reversal is only warranted if the error "resulted in the conviction of an actually innocent defendant" or "seriously affected the fairness, integrity or public reputation of judicial proceedings...." Id. (quotation marks and brackets omitted).

FN15. Both this Court and the United States Supreme Court have left open the possibility that there is a category of errors for which the third prong of the plainerror standard is automatically met. See Grant, 445 Mich. at 551-552, 552 n 30 (stating that a defendant should establish prejudice in order to avoid forfeiture of an unpreserved issue "[e]xcept, of course, in the class of cases in which prejudice is presumed"); Carines, 460 Mich. at 763 n 8. See also Puckett v. United States, ---U.S. ----; 129 S Ct 1423, 1432; 173 L.Ed.2d 266 (2009) (stating that "[t]his Court has several times declined to resolve whether 'structural' errors-those that affect 'the framework within which the trial proceeds,' automatically satisfy the third prong of

the plain-error test"). In any event, this issue does not arise in this case because we agree with the United States Supreme Court's determination that a Doyle violation is not the type of error from which prejudice would generally be presumed. See Brecht v. Abrahamson, 507 U.S. 619, 629; 113 S Ct 1710; 123 L.Ed.2d 353 (1993).

2. Application of Plain-Error Review

In this case, the four requirements of plain-error review are met, and, therefore, reversal is warranted.

First, there was an error. Defendant's due process rights were violated by the prosecution's references to defendant's post-arrest, post- Miranda silence, and defendant did not waive his rights.

Second, the error was plain. As discussed, the error was an obvious violation of a defendant's due process rights under Doyle and its progeny.

Third, defendant has shown that the error affected his substantial rights. Under the third prong of plain-error review, a defendant must generally show that the error was prejudicial. It is difficult for an appellate court to know what effect the prosecutor's repeated use of defendant's post-Miranda silence might have had on the jury. Nonetheless, we hold that defendant has shown that the error is prejudicial, considering (1) the extent of the prosecutor's comments, (2) the extent to which the prosecutor attempted to tie defendant's silence to his guilt, and (3) the overall strength of the case against defendant when considered in light of the degree to which the jury's assessment of the evidence might have been

affected by the prosecutor's references to defendant's silence.FN16 In contrast to the other Doyle case we decide today, People v. Borgne, --- Mich. ----; --- NW2d ---- (Docket No. 134967, issued July 1, 2009), in which we consider these same factors, the error in this case was clearly prejudicial.

FN16. Federal courts of appeals have considered similar factors when evaluating whether a Doyle violation warrants reversal under plain-error review. See, e.g., Guam v. Veloria, 136 F3d 648, 652 (CA 9, 1998). Plain-error review, as articulated in Carines and Grant, is based on the federal courts' interpretation of the FR Crim P 52(b). See Carines, 460 Mich. at 762-766; Grant, 445 Mich. at 547-550, 552-553. Although Michigan courts are of course not bound by the federal courts' application of FR Crim P 52(b), and plain-error review is an inevitably case-specific and fact-intensive inquiry, we find the factors used by the federal courts of appeals useful for plain-error review in this case. While Veloria was a "plain error" case, the factors used there to evaluate the effect of a Doyle error on a trial are traceable to United States v. Newman, 943 F.2d 1155 (CA 9, 1991), which applied the "harmless beyond a reasonable doubt" standard from Chapman v. California, 386 U.S. 18; 87 S Ct 824; 17 L.Ed.2d 705 (1967). In footnote 9 of Carines, this Court distinguished "plain error" review from "harmless error" review. Carines, 460 Mich. at 764 n 9. We do not intend to nullify that distinction by our use of the Veloria test.

To begin with, the more extensive a prosecutor's references to a defendant's post-arrest, post-Miranda silence, the more likely it is that the references had a prejudicial effect. In this case, the

prosecutor's references to defendant's silence were frequent throughout the trial, from the prosecutor's opening and closing statements, to his case-in-chief, to his cross-examination of defendant. The pervasiveness of the prosecutor's references to defendant's silence increases the likelihood that the references had a prejudicial effect.

Further, a prosecutor's references to a defendant's post-arrest, post- Miranda silence are more likely to be prejudicial the more directly or explicitly the prosecutor uses the silence to challenge a defendant's credibility or show a defendant's guilt. In this case, the references to defendant's post-arrest silence were not inadvertent references that the jury might not have connected to defendant's guilt. Instead, the prosecutor referred to defendant's silence in a manner that deliberately challenged defendant's credibility and his claim of innocence. In addition, the prosecutor impliedly suggested that defendant's silence was evidence of his guilt and even explicitly asked the jury to infer guilt from defendant's silence in his closing argument. In comparison, in Borgne, the prosecutor did use the defendant's silence to challenge the credibility of defendant's exculpatory story, but he did not go so far as to explicitly or impliedly suggest to the jury that it should infer guilt from the silence.FN17

FN17. This comparison is not intended to suggest that a defendant's silence must be used in the prosecutor's case-in-chief in order to be prejudicial; it is certainly conceivable that the use of a defendant's silence only for impeachment purposes could be prejudicial, depending on a case's

circumstances. See, e.g., Veloria, 136 F3d at 652-653.

Finally, the degree to which prosecutorial references to a defendant's post-arrest, post-Miranda silence are prejudicial depends on the overall strength of the case against the defendant and the degree to which the jury's assessment of the evidence might have been affected by the prosecutor's references to a defendant's silence. In this case, the strength of the prosecutor's overall case against defendant hinged entirely on the jury's assessments of the witnesses' credibility. It consisted mainly of AS's testimony and the corroborating testimony of her sisters, but the sisters' testimony conflicted at times with AS's. The jury's acquittal of defendant on the charges of first-degree criminal sexual conduct suggests that at least some of the jurors questioned AS's credibility as compared to defendant's, even with the prosecutor's impermissible references to defendant's silence. The trial was essentially a credibility contest between defendant and AS and her sisters, and the prosecutor's repeated references to defendant's silence might have undermined defendant's credibility. In contrast, in Borgne, the degree to which the jury would have found much of the evidence credible was not directly affected by the prosecutor's references to the defendant's silence. Specifically, the prosecution in Borgne presented physical evidence against the defendant and eyewitness testimony corroborating the victim's account of the events.

In sum, in this case, in light of the prosecutor's extensive references to defendant's silence, the extensive connection of that silence to defendant's guilt, the inconsistencies in the

prosecutor's case and the other evidence presented against him, and the nature of defendant's defense-which hinged on his own credibility, we hold that the error was prejudicial.FN18

FN18. We note that, under the circumstances of this case, defense counsel's attempts during trial to lessen the impact of the Doyle errors by asking defendant why he did not make statements before trial, did not waive the error, cure it, or render it harmless.

Fourth, there is no question that this is the sort of error that compromises the fairness, integrity, and truth-seeking function of a jury trial. The violation of defendant's due process rights rendered the trial fundamentally unfair and cast a shadow on the integrity of our state's judicial processes. Therefore, all four requirements of plain-error review are met, and reversal is warranted.

IV. CONCLUSION

The prosecutor's references to defendant's post-arrest, post- Miranda silence violated defendant's due process rights under the federal constitution. The violation amounts to plain error that affected defendant's substantial rights, and it compromised the fairness, integrity, and public reputation of the judicial proceedings. Therefore, we reverse defendant's conviction and remand to the trial court for further proceedings.

MICHAEL F. CAVANAGH, MARILYN KELLY, ELIZABETH A. WEAVER, MAURA D. CORRIGAN, STEPHEN J. MARKMAN and DIANE M. HATHAWAY, JJ., concur.

KELLY, C.J. (concurring).

I concur with the majority opinion. However, I continue to believe that this Court should not have extended the plain-error doctrine to the kind of unpreserved constitutional error present in this case. As I stated in my dissent in People v. Carines, I believe that, when there is unpreserved constitutional error, a defendant's conviction should be affirmed only " 'if the reviewing court is satisfied that the error is harmless beyond a reasonable doubt.' " FN1

FN1. People v. Carines, 460 Mich. 750, 778; 597 NW2d 130 (1999) (Kelly, J., dissenting), quoting People v. Graves, 458 Mich. 756, 482; 581 NW2d 229 (1998).

It appears that, under the Carines plain error standard, there is never error requiring reversal when there is a "wealth of incriminating evidence." FN2 Under those circumstances, the judicial system essentially exempts criminal defendants from the constitutional right to due process of law.

FN2. People v. Borgne, --- Mich. ----, --- NW2d ----, issued June 24, 2009 (Docket No. 134967) slip op at 26.

In the interest of preserving the integrity of the judicial system, we should re-elevate due process to its proper place. The present blatant and repeated abrogation of people's constitutional rights threatens the foundation of the court system.

I recognize that Carines remains the law in Michigan and cannot be ignored, but I believe the

Court should reexamine it at the earliest possible moment.

YOUNG, J. (concurring).

I concur in the result and analysis of the majority opinion. I write separately because I will not join footnote 14, in which Justice Cavanagh "dissents" from the CarinesFN1 plain-error analysis in his own opinion. Justice Cavanagh is entitled to such views, but his opposition to this Court's precedent and preservation of his view is better placed in a concurring statement.

FN1. People v. Carines, 460 Mich. 750; 597 NW2d 130 (1999).